82-801

No. A-272

Office-Supreme Court, U.S.
FILED
DEC 15 1982
ALEXANDER L. STEVAS, CLERK

In the Supreme Court of the United States

October Term, 1982

HARKINS AND COMPANY, et al.,
Petitioners,

vs.

JAMES W. ELLIOTT, JR., et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

ALEX A. ALSTON, JR.
(Counsel of Record)
MARY C. HENKEL
THOMAS, PRICE, ALSTON, JONES & DAVIS
519 First National Bank Building
Post Office Drawer 1532
Jackson, Mississippi 39205
Telephone: (601) 948-6882

DONALD B. PATTERSON
Kees Building
Post Office Box 888
Brookhaven, Mississippi 39601
Telephone: (601) 833-7071

JOHN T. ARMSTRONG
ARMSTRONG & HOFFMAN
Post Office Box 190
Hazlehurst, Mississippi 39083

WILLIAM E. HATHORN
Post Office Box 759
Prentiss, Mississippi 39474
Counsel for Respondents

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTIONS PRESENTED

1. Does Rule 43(a) of the Rules of the Supreme Court of Mississippi, providing that no appellate opinion will generally be written in cases affirming the trial court, violate the due process clause of the United States Constitution?

2. Is this Court's jurisdiction shown where Petitioners raise for the first time in their petition for certiorari a claim that judicial bias violating due process was shown by the trial judge's comment that he knew both parties' predecessors in interest were good businessmen?

3. Even if a decision of the state courts is completely inconsistent with the state substantive law precedent, is federal due process infringed or the jurisdiction of this Court properly invoked?

PARTIES TO THE PROCEEDING BELOW

Petitioners' list of the parties below is satisfactory and is adopted by reference.

TABLE OF CONTENTS

Questions Presented I
Parties to the Proceeding Below II
Opinion Below 1
Lack of Jurisdiction 1
Constitutional Provision Involved 4
Statement of the Case 5
Summary of the Argument 7
Argument in Opposition to Granting the Writ 9

1. Rule 43(a) of the Rules of the Supreme Court of Mississippi Is Constitutional 9
2. No Issue of Improper Bias of a Judge in State Court Proceedings, Violative of Due Process, Is Properly Presented in This Case 12
3. The Due Process Clause of the United States Constitution Does Not Guarantee State Litigants the Benefit of Prior State Law Precedents 14

Conclusion 16
Appendix A 17

Table of Cases

Agins v. Tiburon, 447 U.S. 255, 259 (1980) 4, 15
American Railway Express v. Kentucky, 273 U.S. 269, 272-273 (1927) 14, 15
Anders v. California, 386 U.S. 738 (1967) 11
Arrowsmith v. Harmoning, 118 U.S. 194, 195 (1886) 15
Bessler Movable Stairway Co. v. Bank of Leakesville, 140 Miss. 537, 106 So. 445 (1926) 3, 10
Black v. Washington, 65 Miss. 60, 3 So. 140 (1887) 3, 10
Bonner v. Gorman, 213 U.S. 86, 91 (1909) 15

Bowe v. Scott, 233 U.S. 658, 663 (1914) 2
Cardinale v. Louisiana, 394 U.S. 437, 439 (1969) 4
Chandler v. Florida, 449 U.S. 560, 570 (1981) 12
Colson v. Sims, 220 So. 2d 345, 346 (Miss. 1969) 3, 10
Crooker v. Hollingsworth, 210 Miss. 636, 46 So. 2d 541 (1950) 15
Department of Mental Hygiene v. Kirchner, 380 U.S. 194, 197 (1965) 4
Enterprise Irrigation District v. Farmers Mutual Canal Co., 243 U.S. 157, 166 (1917) 14
Estate of Briscoe v. Briscoe, 255 So. 2d 313, 314-15 (Miss. 1971) 3, 10
Goldberg v. Kelly, 397 U.S. 254 (1970) 10, 11
Harkins and Company, et al. v. Elliott, et al., No. 53,095 (Miss. Sup. Ct. Mar. 17, 1982), *reh'g denied*, June 30, 1982 .....2, 13
Iowa Central Railway v. Iowa, 160 U.S. 389, 393 (1896) 15
Mathews v. Eldridge, 424 U.S. 319, 333 (1976) 10
McDonald v. Oregon Railroad & Navigation, 233 U.S. 665, 669 (1914) 15
McLaurin v. Royalties, Inc., 231 Miss. 240, 95 So. 2d 105 (1957) 15
Michigan v. Tyler, 436 U.S. 499, 500 (1978) 3, 14
Moore v. Illinois, 408 U.S. 786, 799 (1972) 3, 13
New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928) 2
Patterson v. Colorado ex rel. Attorney General, 205 U.S. 454, 460-61 (1907) 4, 15
Pruneyard Shopping Center v. Robins, 447 U.S. 74, 85 (1980) 2
St. Louis & San Francisco Railroad v. Shepherd, 240 U.S. 240, 241 (1916) 2

Sumner v. Mata, 449 U.S. 539 (1981) 11, 12
Tacon v. Arizona, 410 U.S. 351 (1973) 3, 13
Tracy v. Ginzberg, 205 U.S. 170, 177 (1907) 15
Webb v. Webb, 451 U.S. 493, 499-502 (1981) 4
Wood v. Strickland, 420 U.S. 308 (1975) 11
Younger v. Harris, 401 U.S. 37, 44 (1971) 16

Constitution

Constitution of the United States, fourteenth amendment, section 1 4

Statutes

28 U.S.C. § 1257(3) 1
28 U.S.C. § 2254 12

Other Authorities

Rule 52, Federal Rules of Civil Procedure 12
Rules 16.7 and 23.1, Rules of the Supreme Court of Mississippi 12
Rule 43(a), Rules of the Supreme Court of Mississippi 1, 7, 8, 9, 12

No. A-272

In the Supreme Court of the United States

October Term, 1982

HARKINS AND COMPANY, et al.,
Petitioners,

vs.

JAMES W. ELLIOTT, JR., et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

OPINION BELOW

Petitioners Harkins and Company, et al. ("Harkins") have satisfactorily cited the opinions and judgments delivered below.

LACK OF JURISDICTION

Harkins claims jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3). It does not in its jurisdictional statement, or elsewhere in its petition, show this Court's jurisdiction by virtue of questions properly presented and considered by the state courts below.

Though Harkins never explicitly cites the rule, it attacks Rule 43(a) of the Rules of the Supreme Court of Mississippi, which states:

> (a) *Written Opinions.* In all cases where the judgment or decree of the trial court is affirmed, no opinion will be written unless a majority of the Justices deciding the case determine that a written opinion will add to the value of the jurisprudence of this State.

Harkins made no claim of federal due process right to a written opinion in its petition for rehearing, claiming merely that "[t]he panel erred as a matter of law. . . ." (Appendix A at 6). The State Supreme Court denied the petition for rehearing without any discussion of the circumstances in which state or federal law might require a written opinion to affirm a lower court. This Court has long held that it will not take jurisdiction of a question neither properly raised nor considered below. *St. Louis & San Francisco Railroad v. Shepherd*, 240 U.S. 240, 241 (1916); *Bowe v. Scott*, 233 U.S. 658, 663 (1914).

Harkins next attacks an alleged "Statement of Bias" by the trial judge below as a deprivation of its rights to due process of law. Its summary of the appellate argument below [Petition at 4] like that argument itself [Brief for Appellants at 23-25, *Harkins and Company, et al. v. Elliott, et al.*, No. 53,095 (Miss. Sup. Ct. Mar. 17, 1982), *reh'g denied*, June 30, 1982], makes no reference whatsoever to any federal right, the fourteenth amendment or due process. Knowing that only a possible evidentiary error, not judicial bias violative of federal due process rights, was claimed below, Harkins boldly asserts that *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928), and *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 85 n. 9 (1980), supports an argument that points presented to the lower court without any reference to federal constitutional rights will invoke this Court's jurisdiction. These cases support no such argument. In

each of these cases, there was some showing that the state courts were at least notified that constitutional rights were claimed to be at issue. Such was not the case here.

Furthermore, Harkins incorrectly asserts in Question 1 of its Questions Presented, Petition at (i), and throughout its Petition, that error in the trial judge's allegedly biased statement "was first properly raised before the State Supreme Court." In fact, the rule in Mississippi is that alleged errors of the trial court must be presented to it by objection or motion, giving the lower court an opportunity to rule on them, in order to properly preserve them on appeal. *Bessler Movable Stairway Co. v. Bank of Leakesville,* 140 Miss. 537, 106 So. 445 (1926); *Black v. Washington,* 65 Miss. 60, 3 So. 140 (1887); *Estate of Briscoe v. Briscoe,* 255 So. 2d 313, 314-315 (Miss. 1971); *Colson v. Sims,* 220 So. 2d 345, 346, n. 1 (Miss. 1969). Harkins did not object in the trial court to the judge's comment, did not move the judge to recuse himself, and did not make any post-hearing motion in light of the statement after the ruling against Harkins. Mississippi has a legitimate interest in requiring litigants to present any objection to what they consider judicial bias directly to the trial judge, and Harkins' default in this regard bars this claim in this Court. *Michigan v. Tyler,* 436 U.S. 499, 500 n. 7 (1978).

Lastly, Harkins attempts to put matters of Mississippi law governing the construction of deeds before this Court by the device of claiming that the trial court's judgment and the State Supreme Court's affirmance denied due process of law by reason of inconsistency with controlling state precedent. This contention is raised for the first time in this Court. This Court does not have jurisdiction of issues raised for the first time before it. *Tacon v. Arizona,* 410 U.S. 351 (1973) (*per curiam*); *Moore v. Illinois,* 408 U.S 786, 799 (1972). Whether or not a state

court decision is "wrong" or inconsistent with state precedent, litigants have no liberty or property interest in the benefit of prior precedent. *Patterson v. Colorado ex rel. Attorney General*, 205 U.S. 454, 460-61 (1907); *Agins v. Tiburon*, 447 U.S. 255, 259 n. 6 (1980). To recognize such a "right" would freeze the jurisprudence of the states in a time lock wholly inconsistent with the traditions of the evolving common law and of federal-state comity.

> It is appropriate to emphasize again, see *Cardinale v. Louisiana*, [394 U.S. 437] at 439 [(1969)], that there are powerful policy considerations underlying the statutory requirement and our own rule that the federal challenge to a state statute or other official act be presented first to the state courts. These considerations strongly indicate that we should apply this general principle with sufficient rigor to make reasonably certain that we entertain cases from state courts only where the record clearly shows that the federal issue has been properly raised below.

Webb v. Webb, 451 U.S. 493, 499 (1981); and further discussion, *Id.* at 499-502.

Harkins fails to sustain its burden of proof to show jurisdiction, *Department of Mental Hygiene v. Kirchner*, 380 U.S. 194, 197 (1965), and the writ of certiorari must be denied.

CONSTITUTIONAL PROVISION INVOLVED

Respondent Elliott ("Elliott") acknowledges that Harkins bases its arguments on the Constitution of the United States, fourteenth amendment, section 1, and that Harkins has correctly quoted the same, but denies that the provision has any application here.

STATEMENT OF THE CASE

The Chancery Court of Jefferson Davis County, Mississippi, on January 7, 1981, issued its final decree confirming and quieting the title of Elliott to a disputed 4.5/32nds interest in gas-producing land. Elliott claims through B. C. Griffith, grantor in the disputed deed construed by the trial court, and Harkins claimed through Robert B. Dale, the grantee in that deed.

The evidence showed that at the time of the original deed from Griffith to Dale, Griffith owned only a 4.5/32nds interest. Griffith's deed to Dale indicated in the granting clause that a 9/32nds interest was to be conveyed, but limited that grant in a clause stating that "this instrument is to convey to grantee all of grantor's mineral rights in and to the above described land" (hereinafter "limitation clause"). The trial court construed the deed to pass only the 4.5/32nds interest then owned by Griffith to Dale, and held that an interest which Griffith later acquired remained vested in Griffith and his grantees, Elliott, et al.

At a break in the proceedings at trial, off the record, the trial judge commented:

> I knew both B. C. Griffith and Robert Dale, they weren't anybody's fools, they were good businessmen and knowledgeable about the oil business and would not have put something in the instrument without some reason, unless it meant something.

No objection was made to the statement or to the trial judge's qualification to rule on the case at the time the statement was made; no motion to recuse was entered at that or any time; and no post-hearing motion was brought before the trial court on the basis of the statement.

The trial court approved and signed a Bill of Exceptions presented by Harkins after the close of the proceedings and issuance of the decree. This Bill of Exceptions served to make the comment of record but not to inform the judge of any objection to it.

Under Rule 6 of the Rules of the Supreme Court of Mississippi, all errors to be considered on appeal must be distinctly assigned in the Assignments of Error. Harkins' appeal to the State Supreme Court assigned as error only the following:

I.

The Lower Court erred in holding that the after-acquired mineral interest of B. C. Griffith did not pass or inure to Robert B. Dale under the Doctrine of after-acquired title.

II.

The Lower Court erred in its construction of the July 5, 1944 Mineral Right and Royalty Transfer from B. C. Griffith to Robert B. Dale.

III.

The Lower Court erred in considering facts known to and personal opinions held by the Chancellor and which were not in evidence.

IV.

The Lower Court erred by excluding evidence that the July 5, 1944 Mineral Right and Royalty Transfer from B. C. Griffith to Robert B. Dale was not prepared by Robert B. Dale.

The State Supreme Court affirmed without opinion on March 17, 1982, the usual procedure for affirmance in that court pursuant to its Rule 43(a), *supra*. Harkins subsequently filed a petition for rehearing in the State Supreme Court, which is set out in full as Appendix 1. At no point in any of these proceedings did Harkins cite the federal constitution, federal due process rights, the fourteenth amendment, or any cases relying thereon, or otherwise give any indication to the courts of the state that it intended to present claims pursuant to the fourteenth amendment to the Constitution of the United States, section 1, or that it considered such rights at issue.

The State Supreme Court denied the petition for rehearing on June 30, 1982, and Harkins, after obtaining an extension of time to do so, filed the instant petition for a writ of certiorari on or about November 12, 1982, and same was received by counsel of record for Elliott on November 15, 1982.

SUMMARY OF THE ARGUMENT

Harkins attacks *sub silentio* Rule 43(a) of the Rules of the Supreme Court of Mississippi, providing that no appellate opinion will generally issue in cases affirming the trial court. Harkins maintains that a written opinion is constitutionally mandated, at least where a constitutional claim is first properly raised in the State Supreme Court. No constitutional claim was raised in the Mississippi Supreme Court, nor was Harkins entitled to raise its alleged claim there for the first time. This Court's opinions defining the minimal due process applicable when the government initially deprives citizens of private interests have no relevance to the issuance of written opinions by state appellate courts. Harkins had a full trial which satisfied

due process. The Constitution does not mandate that state appellate courts write full opinions in every case, and this Court will not assume a supervisory role over the rules of the state courts. Rule 43(a) of the Rules of the Mississippi Supreme Court is constitutional.

The comment of the trial judge below allegedly showing bias is ambiguous on its face, and does not show bias for or against either side in the litigation. Even if it did, however, the error was not properly preserved under state rules, nor was constitutional error argued to the State Supreme Court. Harkins' argument that the trial judge's statement reflected bias which deprived Harkins of property without due process is thus not properly before this Court, and is foreclosed on independent state grounds.

Harkins asserts that this Court should reverse the Mississippi courts on a matter of deed construction wholly governed by state law because the state courts allegedly departed from prior state substantive law precedent. This contention does not properly raise a federal question and has been soundly rejected by this Court on many occasions.

ARGUMENT IN OPPOSITION TO GRANTING THE WRIT

Harkins' petition presents nothing novel, unsettled or worthy of further consideration by this Court. Its attempt to constitutionalize elementary alleged errors of state law, on which the state courts have ruled against it, is nothing new to this Court. The claims Harkins raises, stripped of the semantic camouflage devised to obscure their failure to properly present any federal question, are in truth old propositions on which this Court has long since ruled, and ruled adversely.

1. Rule 43(a) of the Rules of the Supreme Court of Mississippi Is Constitutional.

Harkins, without citing Rule 43(a) of the Rules of the Supreme Court of Mississippi, attacks that rule, and its application in this case to affirm without opinion the ruling of the lower court against Harkins. Harkins contends that it was entitled to a written opinion from the State Supreme Court, first, on the false premise that it was entitled to raise for the first time before the State Supreme Court a claim relating to the comment made by the trial judge. Harkins did not present any claim of unconstitutional bias, even for the first time, before the State Supreme Court. See "Lack of Jurisdiction," *supra*, and point 2, *infra*. Harkins' second mistake is a misreading of this Court's precedents concerning the applicable minima of due process in connection with various governmental takings.

Harkins asserts, erroneously, that an allegation of error based on a trial judge's comment may be first properly raised in the Mississippi Supreme Court. To the contrary, Mississippi maintains a strict rule of contemporaneous ob-

jection, requiring the submission of discrete alleged errors to a ruling by the trial judge immediately upon their occurrence, and further requiring the submission of cumulative errors, such as the return of a verdict against the weight of the evidence or evincing bias and prejudice, to a ruling of the trial court by way of a post-trial motion. *Bessler Movable Stairway Co. v. Bank of Leakesville,* 140 Miss. 537, 106 So. 445 (1926); *Black v. Washington,* 65 Miss. 60, 3 So. 140 (1887); *Estate of Briscoe v. Briscoe,* 255 So. 2d 313 (Miss. 1971); *Colson v. Sims,* 220 So. 2d 345, 346 n. 1 (Miss. 1969).

Next, in Harkins' argument that this Court should compel a state appellate court to write an opinion on every case before it, Harkins misplaces its reliance on prior decisions of this Court dealing with the court, tribunal or authority of original jurisdiction in matters of governmental deprivation of private interests.

Harkins cites *Mathews v. Eldridge,* 424 U.S. 319 (1976), and *Goldberg v. Kelly,* 397 U.S. 254 (1970), in support of its novel proposition that this United States Supreme Court should require written opinions from state supreme courts in all cases, or in all cases in which a due process claim is allegedly first properly raised before the appellate court. This reliance is misplaced. *Mathews* and *Goldberg* involved administrative decision makers. The question at issue in each of these cases was, as stated in *Mathews,* 424 U.S. at 333, whether or not "a hearing closely approximating a judicial trial is necessary" in connection with the government's taking action affecting a private interest. Furthermore, the substantiality of the private interest is defined in these cases, not in monetary sums, but in terms of the threat posed by the deprivation to the citizen's most basic liberties, or very means of survival. In *Mathews,* social security disability income was held not to be vital enough, even by this standard, to deserve, as did the sub-

sistence welfare benefits in *Goldberg*, a hearing approximating a judicial trial.

These cases are wholly irrelevant to Harkins' claim. It had a full judicial trial and a written final judgment issued by the trial court.

The rest of the cases cited in the Petition at 8-10 involve for the most part this Court's comments, in the course of its proper supervision of the lower federal courts, on the need for original written findings of fact by the federal trial courts, including district courts and three-judge courts. For example, *Wood v. Strickland*, 420 U.S. 308 (1975), does not support Harkins' proposition that a written statement is constitutionally mandated in all cases where issues of constitutional due process are presented. In fact, this Court stated in *Wood* that it would decline to consider an argument supporting the federal appeals court judgment, based on a procedural due process point not addressed by the court of appeals or district court below. *Anders v. California*, 386 U.S. 738 (1967), and *Sumner v. Mata*, 449 U.S. 539 (1981), likewise wholly fail to support the propositions for which Harkins cites them. These are cases dealing with the writ of habeas corpus attacking criminal conviction, thus involving the total deprivation of a citizen's liberty by the government, and are distinguishable on that basis alone from Harkins' case, involving a judgment settling rights to real property between two private citizens. Neither case, however, even supports the proposition that a state supreme court is constitutionally obliged to issue a written opinion when affirming the judgment of a lower court on a prisoner's collateral attack on conviction. As explained in *Sumner*, the federal right of habeas corpus is considered so vital that appellate courts are uniquely empowered to make or reverse findings of fact in such cases. However, when reversing judgments of state courts, and in the interests of federalism, federal courts are required to

discuss and make findings on any ruling that the state court erred on the facts.

Harkins here urges this court to employ the federal due process clause to create a new rule for state supreme courts. This argument runs entirely counter to the cautions expressed in *Sumner*, which emphasizes a due regard for considerations of federalism.

Rule 43(a) of the Rules of the Supreme Court of Mississippi is entirely valid and consistent with federal due process. It has a parallel in Rules 16.7 and 23.1 of this Supreme Court, providing for summary disposition on the merits in cases arising both under this Court's obligatory appellate jurisdiction and upon petition for certiorari.

This Court eschews the assumption of a supervisory role over the state courts. *Chandler v. Florida*, 449 U.S. 560, 570 (1981). Neither Rule 52 of the Federal Rules of Civil Procedure nor 28 U.S.C. § 2254, on which most of Harkins' cited cases turn, are of constitutional magnitude; nor do they have any application to the Mississippi Supreme Court. Harkins' contention is without support in precedent or in the policy considerations of federalism and should be denied even if it had been properly raised.

2. No Issue of Improper Bias of a Judge in State Court Proceedings, Violative of Due Process, Is Properly Presented in This Case.

The off-the-record statement of the trial judge in this case, to which Harkins refers in its Petition, though nowhere below, as the "Statement of Bias," was as follows:

> I knew both B. C. Griffith [Elliott's predecessor in interest] and Robert Dale [Harkins' predecessor in interest], they weren't anybody's fools, they were good businessmen and knowledgable about the oil business and would not have put something in the instru-

> ment without some reason, unless it meant something.

This passing comment of the chancellor, in a trial without a jury, is completely neutral as to the predecessors of parties on both sides of the litigation. Since the debate below was about whether the granting clause, mentioning a 9/32nds interest, or the limitation clause would control, a remark about putting "something in the instrument" is really entirely ambiguous. The remark favored neither side. Harkins concedes that the statement does not evince any type of bias previously recognized by this or lower federal courts. Petition at 10 n. 3.

No discussion of the meaning or constitutional impact of the comment was had below. Harkins did not raise it in the trial court and argued in the State Supreme Court only that it was an evidentiary impropriety. *Harkins, supra,* Brief for Appellants at 23-25. The statement was not even mentioned in Harkins' petition for rehearing. See Appendix A.

The issue of whether state evidentiary rules of law were properly applied is not subject to review in this court. *Moore v. Illinois,* 408 U.S. 786, 799 (1972).

The claim that the statement evinced bias depriving Harkins of due process is, as discussed above, raised for the first time in this Court and is thus not subject to this Court's consideration. *Moore v. Illinois,* 408 U.S. 786 (1972); *Tacon v. Arizona,* 410 U.S. 351 (1973) (*per curiam*). Mississippi has a legitimate interest in requiring that litigants object, move for recusal, or move for a new trial in the court of original jurisdiction. A trial judge deserves at least to be informed that a party perceives bias and prejudice in a statement of the court, and deserves an initial opportunity to consider recusal in the interest of propriety or the appearance of same. By submission of its

Bill of Exceptions, Harkins put the statement in the record, but only after the verdict against it, and without any indication to the trial court of any manner or regard in which it felt it was wronged by the statement, and without allowing that court any opportunity to grant a new trial in the matter, before another judge or otherwise. Thus, under the rule of *Michigan v. Tyler*, 436 U.S. 499 (1978), the issue is foreclosed on independent state grounds.

3. The Due Process Clause of the United States Constitution Does Not Guarantee State Litigants the Benefit of Prior State Law Precedents.

Harkins wants this court to reverse the Mississippi Supreme Court on a question governed wholly by state law rules of deed construction. It asserts that this Court should meddle in state substantive law in this manner because the state court decision was "so clearly erroneous as to constitute arbitrary and capricious action." For the principle that this Court will do so it relies almost entirely on *American Railway Express v. Kentucky*, 273 U.S. 269 (1927).

Harkins' contention is very ill-supported by *American Railway Express*. *American Railway Express* concerned a judgment, affirmed without opinion on appeal, in favor of the state and imposing liability on a purchaser of bulk assets for a debt of its predecessor to the state. In refusing to interfere with the Kentucky court's judgment, this Court stated, *inter alia*:

> "The due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable this court to revise the decisions of the state courts upon questions of state law."

Id. at 272-73, quoting *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157, 166 (1917).

Any weight to be given the dictum to which Harkins clings, *id.* at 273, implying that this Court will interfere where a "judgment amounts to mere arbitrary or capricious exercise of power," must be given with regard to the context of *American Railway Express.* That case involved the state court's judgment in favor of the state, not its adjudication of a controversy between private parties as in the present case. The paragraph which follows that dictum states forcefully:

> It is firmly established that a merely erroneous decision given by a state court in the regular course of judicial proceedings does not deprive the unsuccessful party of property without due process of law. *Arrowsmith v. Harmoning,* 118 U.S. 194, 195 (1886); *Iowa C. R. Co. v. Iowa,* 160 U.S. 389, 393 (1896); *Tracy v. Ginzberg,* 205 U.S. 170, 177 (1907); *Bonner v. Gorman,* 213 U.S. 86, 91 (1909); *McDonald v. Oregon R. & Nav. Co.,* 233 U.S. 665, 669 (1914).

American Railway Express, supra at 273.

Harkins' argument here is neither novel nor tenable.

Elliott certainly does not concede that any state law precedent was incorrectly applied by the courts below. Under the authorities cited to the courts below, the Mississippi Supreme Court was manifestly correct in construing the subject deed in favor of Elliott and holding that the doctrine of after-acquired title was not applicable. *E.g., McLaurin v. Royalties, Inc.,* 231 Miss. 240, 95 So. 2d 105 (1957); *Crooker v. Hollingsworth,* 210 Miss. 636, 46 So. 2d 541 (1950). However, there is no need to rebut Harkins' argument of state law again in view of the unequivocal prior statements of this Court that such pure applications of state law are not reviewable here. *Agins v. Tiburon,* 447 U.S. 255, 259 n. 6 (1980), and *Patterson v. Colorado ex rel. Attorney General,* 205 U.S. 454, 460-61 (1907).

CONCLUSION

None of the contentions of Harkins in the instant petition for a writ of certiorari are properly raised, and all run counter to the basic concepts of federalism and to that "proper respect for state functions" elucidated by this Court in *Younger v. Harris*, 401 U.S. 37, 44 (1971).

The petition for a writ of certiorari to review the judgment of the Mississippi Supreme Court should be denied.

Respectfully submitted,

JAMES W. ELLIOTT, JR., et al.
By: ALEX A. ALSTON, JR.
(Counsel of Record)
MARY C. HENKEL
THOMAS, PRICE, ALSTON, JONES & DAVIS
519 First National Bank Building
Post Office Drawer 1532
Jackson, Mississippi 39205
Telephone: (601) 948-6882

DONALD B. PATTERSON
Kees Building
Post Office Box 888
Brookhaven, Mississippi 39601
Telephone: (601) 833-7071

JOHN T. ARMSTRONG
ARMSTRONG & HOFFMAN
Post Office Box 190
Hazlehurst, Mississippi 39083

WILLAM E. HATHORN
Post Office Box 759
Prentiss, Mississippi 39474
Counsel for Respondents

APPENDIX

APPENDIX A

(Filed April 6, 1982)

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 53,095

HARKINS AND COMPANY, ET AL
APPELLANTS

VS.

JAMES W. ELLIOTT, JR., ET AL
APPELLEES

APPELLANTS' PETITION FOR REHEARING
(ORAL ARGUMENT REQUESTED)

KENNETH I. FRANKS
GLENN GATES TAYLOR
HEIDELBERG, WOODLIFF & FRANKS
Suite 1030, Capital Towers
Jackson, Mississippi 39201
(601) 948-3800

JOHN E. MILNER
BRUNINI, GRANTHAM, GROWER & HEWES
1400 First National Bank Building
Post Office Drawer 119
Jackson, Mississippi 39205
(601) 948-3101
Attorneys for Appellants

PETITION FOR REHEARING

COMES NOW the Appellants and petition the Court for a rehearing of the decision previously handed down by the panel in this case and for cause would respectfully show that the hearing panel of the Court committed the following errors of fact and law, to-wit:

1.

The panel erred as a matter of law because its decision irreconcilably conflicts with or entirely overrules the existing case law precedents of this Court concerning the application of the doctrine of after-acquired title and effectively nullifies this doctrine.

2.

The panel erred as a matter of law because its decision irreconcilably conflicts with or entirely overrules *sub silentio* the existing case law precedents of this Court concerning the rules of construction which are to be applied to consture instruments of real estate conveyance.

3.

The panel erred as a matter of law by failing to apply the doctrine of after-acquired title to pass Griffith's after-acquired mineral interest to his grantee and Appellants' predecessor-in-title, Robert B. Dale, in satisfaction of his specific grant and warranty of a 9/32nds mineral interest. Its decision is contrary to law and is against the overwhelming weight of the evidence.

4.

The panel erred as a matter of law by failing to apply the rules of construction in interpreting the July 5, 1944

Mineral Right and Royalty Transfer instrument that is the subject of controversy in this case.

5.

The panel erred as a matter of law by affirming the Final Decree of the Chancery Court of Jefferson Davis County.

6.

The panel erred as a matter of law by failing to issue a written opinion addressing the serious and fundamental questions of law concerning the continued viability of the doctrine of after-acquired title and of the rules of construction which apply to construe instruments conveying real property in this State in light of its decision.

In support hereof Appellants submit the accompanying Brief in Support of Petition of Rehearing and respectfully request the opportunity to present oral argument to the Court.

DATED this the 6th day of April, 1982.

Respectfully submitted,

HARKINS AND COMPANY:
ST. JOE PATROLEUM (U.S.) CORPORATION:
FIRST MISSISSIPPI CORPORATION:
JERRY E. ZOBLE:
A. G. HOLZAPEL, Trustee for Mississippi - Alabama Employees Trust No. 2 and Harkins and Company; Employees Profit Sharing Plan No. 1;
H. B. HARKINS;
HARRY W. HAMILTON;
HARRY W. HAMILTON, AGENT;
JAMES R. LESCH;

RAYMOND M. HOLLIDAY;
RAY BUTLER;
FIRST ENERGY CORPORATION;
GRANVILLE G. TUNSTILL;
WARREN DONALDSON;
H. D. LEE; and
TROY ANDERSON
KENNETH I. FRANKS
GLENN GATES TAYLOR
HEIDELBERG, WOODLIFF & FRANKS
Suite 1030, Capital Towers
Jackson, Mississippi 39201
(601) 948-3800
Attorneys for Said Defendants

AMERADA HESS CORPORATION
By /s/ JOHN E. MILNER
EDMUND L. BRUNINI, JR.
JOHN E. MILNER
BRUNINI, GRANTHAM, GROWER & HEWES
1400 First National Bank Building
Jackson, Mississippi 39205
(601) 948-3101
Attorneys for Amerada Hess Corporation, Appellant

JOHN S. DALE;
HAROLD A. DALE;
DAVID B. DALE;
IRENE DALE POLK;
KATHERINE D. LITTLE;
JAMES L. DALE;
ALBERTA D. BAYLIS;
MUNCIE DALE SMITH;
ETHLYN D. TURNAGE,
MARILYN B. MICHAEL;

BEN G. WALDEN, JR.;
BOBBIE W. FOSTER;
M. R. WALDEN, SR.;
MADISON S. DALE;
FRANCES D. PILLOW;
JOSEPH DALE;
BETTY D. TOUCHSTONE;
BESS S. DALE;
SARAH DALE POLK;
ADA DALE GULLEDGE;
MANCIE DALE JOHNSON;
ROBERT M. DALE;
THOMAS D. DALE;
ROBIN DALE FULLER; and
RICHARD S. DALE

JOSEPH DALE
Attorney at Law
Post Office Box 518
Prentiss, Mississippi 39474
(601) 792-5164

Attorney for John S. Dale, et al., Appellants

CERTIFICATE OF SERVICE

I, JOHN E. MILNER, one of the attorneys for Appellants herein, hereby certify that I have this day forwarded a true and correct copy of the above and foregoing Appellants' Petition for Rehearing to:

Donald R. Patterson, Esq.
Post Office Box 888
Brookhaven, Mississippi 39601

Amrstrong & Hoffman
Post Office Box 190
Hazlehurst, Mississippi 39083

William E. Hathorn, Esq.
Post Office Box 759
Prentiss, Mississippi 39474

M. M. Roberts, Esq.
Post Office Box 870
Hattiesburg, Mississippi 39401

Kenneth I. Franks, Esq.
Glenn Gates Taylor, Esq.
Heidelberg, Woodliff & Franks
Suite 1030, Capital Towers
Jackson, Mississippi 39201

M. Ward Bailey, Esq.
24th Floor Continental Life Building
Forth Worth, Texas 76102

Joe Dale, Esq.
Post Office Box 518
Prentiss, Mississippi 39474

This the 6th day of April, 1982.

/s/ JOHN E. MILNER
JOHN E. MILNER

CERTIFICATE OF SERVICE

I, Alex A. Alston, Jr., one of the attorneys for Respondents herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 13th day of December, 1982, I served true and correct copies of the above and foregoing Brief in Opposition to Petition for a Writ of Certiorari to the Supreme Court of the State of Mississippi on the parties by mailing three copies of said document by first class mail, postage prepaid, to each of the following persons:

(1) WILLIAM F. COCKRELL, JR., ESQ.
MICHAEL G. KUSHNICK, ESQ.
ROSE, SCHMIDT, DIXON & HASLEY
1575 Eye Street, N.W.
Washington, D.C. 20005

(2) EDMUND L. BRUNINI, JR., ESQ.
JOHN E. MILNER, ESQ.
BRUNINI, GRANTHAM, GROWER & HEWES
1400 First National Bank Building
Post Office Drawer 119
Jackson, Mississippi 39205

(3) KENNETH I. FRANKS, ESQ.
GLENN GATES TAYLOR, ESQ.
HARRY E. NEBLETT, JR., ESQ.
HEIDELBERG, WOODLIFF § FRANKS
Suite 1030, Capital Towers
Jackson, Mississippi 39201

(4) R. FRED HOSEY, ESQ.
HARKINS AND COMPANY
Post Office Box 1940
Alice, Texas 78332

I further certify that all parties required to be served have been served.

ALEX A. ALSTON, JR.